Supreme Court, U. S.
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79-2079

IN THE

SUPREME COURT OF THE UNITED STATES

1980 Term

No._____

WALTER DALE BURGESS, - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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No._____

WALTER DALE BURGESS, - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Walter Dale Burgess, respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 25, 1980, affirming his conviction in the United States District Court for the Eastern District of Kentucky.

DECISION BELOW

The Opinion of the Court of Appeals for the Sixth Circuit has not yet been officially reported. The judgment of the United States District Court was not officially reported. A copy of the opinion of the Court of Appeals is printed as an appendix hereto.

JURISDICTION

This is a Petition seeking review of the Order and Judgment of the United States Court of Appeals for the Sixth Circuit entered on April 25, 1980, affirming the conviction of Walter Dale Burgess in the United States District Court for the Eastern District of Kentucky for violation of 18 USC §1201. Petition for rehearing was denied on June 2, 1980. Jurisdiction of this court to review this action on Writ of Certiorari is granted by 28 USC §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1) **Whether It Is Prejudicial Error for the Court to Deny Petitioner's Motion for Judgment of Acquittal In a Prosecution for Kidnapping Pursuant to 18 USC §1201 Where the United States Fails to Establish That the Victim Was Transported in Interstate Commerce, in That It Failed to Establish That In Moving the Victim From the Southern Bank of the Ohio River at Ashland, Kentucky, to a Point on the Bank of the Ohio River, That He Crossed the State Boundary Between Ohio and Kentucky.**

2) **Whether It is Prejudicial Error for the Trial Court to Instruct the Jury That Petitioner Could Be Convicted as an Aider and Abettor Pursuant to 18 USC §2 Where There Was No Evidence of Record That Petitioner Knew or Anticipated That the Victim of a Kidnapping Would Be Transported in Interstate Commerce.**

STATUTES INVOLVED

Petitioner's request for relief is based upon construction of the following statutes:

18 USC §2. Principals

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

18 USC §1201. Kidnapping

"(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person except in the case of a minor by the parent thereof when:

(1) the person is willfully transported in interstate or foreign commerce;

(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in Section 101(32) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(32) [49 USCS §1301(32)]) or

(4) the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section

1116(b) of this title [18 USCS §1116(b)], shall be punished by imprisonment for any term of years or for life.

(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to affect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

(d) Whoever attempts to violate subsection (a)(4) shall be punished by imprisonment for not more than twenty years.

(e) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title [18 USCS §§5 and 7] and section 101(34) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(34) [49 USCS §1301(34)]).

(f) In the course of enforcement of subsection (a)(4) and any other sections prohibiting a conspiracy or attempt to violate subsection (a)(4), the Attorney General may request assistance from any Federal, state, or local agency, including the Army, Navy, and Air Force, any statute, rule or regulation to the contrary notwithstanding.

STATEMENT OF THE CASE

(A) Proceedings

This action originated with the return of an indictment in the United States District Court for the Eastern District of Kentucky charging the Petitioner and four others with violation of 18 USC §1201, in that they kidnapped two men at Ashland, Kentucky, and transported them in interstate commerce to the state of Ohio. Trial of the five defendants resulted in conviction of Petitioner and his sentence to four years imprisonment. Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. Judgment of conviction was affirmed by the Court of Appeals on April 25, 1980. Petition for rehearing was denied on June 2, 1980.

(B) Facts

During the summer months of 1979, the Oil Chemical and Atomic Workers Union was on strike against the Semet Solvay Division of Allied Chemical Corporation seeking a labor contract. The Semet Solvay plant

is located on the southern side of the Ohio River at Ashland, Kentucky.

On the night of July 3, 1979, Charles Hood and Walter Burgess launched a boat into the Ohio River at Ashland, Kentucky. The boat was owned by the Union and was being used for picketing on the river at the river loading facilities of the company. T.R., pp. 552-554.[1]

On that night also, Charles Dameron, Ronald Alcorn and Fred Crank also launched a boat on the river. That boat was a green bass fishing boat owned by Dameron. All of the defendants except Hood testified, and all stated that they were not aware when they set out to launch their boats that the others were going on the river. T.R., pp. 521, 695-696, 754-755. No evidence was offered that the two boats were launched by joint design.

After a period of time, and taking the evidence in a light most favorable to the government, the testimony was that Hood approached a car on company property in which two Pinkerton guards, Willis and Fields were sitting. By their testimony, he opened the passenger side door and struck Willis in the face with a gun. He then ordered the two men out of the car and forced them to go down a hillside to the south bank of the Ohio River. Both guards generally agree upon the events to this point. App., pp. 20-26 and 69.

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[1]Reference to the appendix will be made herein by the abbreviation "App." Reference to the Transcript of Record will be made by the abbreviation "T.R."

Upon arrival at the riverbank, the testimony of the guards part ways and rarely cross paths again. Willis claims there was one boat at the bank which took them up stream to a place called Key's Creek where they met a second boat, to which Fields was transferred. Fields states there were two boats at the bank, one called in the evidence the bass boat, that being the one owned by Dameron, the other being the Union's boat, which had been launched by Hood and Burgess. App., pp. 27-29, 69-70.

Both Willis and Fields agree that both boats went on the river nearer the south bank of the river for a period of time with Willis who was bleeding from the nose, and later found to have been shot, in the bass boat with Dameron, Crank and Alcorn and Fields in the Union Boat with Hood and Burgess. At some point, the boats began to proceed down river toward the point at which they originally launched in Ashland, Kentucky. The boats had been out of the sight and hearing of each other and came together again near the Ashland, Kentucky side of the river. App., pp. 38-44 and 78-85.

Once again, the guards versions at this point become many and varied. Willis stated that the next thing he remembers after the boats got back together was getting out of the boat some distance out in the water near the north bank of the Ohio River. App., pp. 43-44. He states that he was at all times in the bass boat with Crank, Dameron and Alcorn, but he does not know whether Fields was taken to Ohio in

the same boat with him or not. He relates no conversation between the five defendants involving a decision to take Fields and Willis to Ohio. App., pp. 38-45.

Fields states that to the best of his recollection, the boat which took him to the north shore of the Ohio was the bass boat, sometimes referred to by him as the dark boat. App., p. 107. Yet at the same time, he said that he thought that it was the Union boat which took him. He followed this statement immediately by stating that he did not know which boat it was. App., p. 108. At other times, he boldly claimed that both boats went to the north bank.

After their release by whomever at the north bank of the Ohio River, Willis and Fields crossed the bridge back to Ashland, Kentucky, where they went to a hospital and proceeded to report the first of their many versions of the events to the police. It was at this point that Fields reported to Ashland Police Detective Keeton that the men with the gun who forced them from the car had blond, sandy colored hair and a sharp face. At trial he identified Charles Hood, a man with black hair and facial features and complexion that caused him to be nicknamed "Indian" by his fellow workers. Hood also had very straight hair. Fields described the gunman as having wavey hair. App., pp. 92-93. The only man fitting the description of the gunman initially given by Fields was Charles Dameron.

The four defendants who testified all stated that it was Dameron, Crank and Alcorn who took Fields

and Willis to the Ohio side, and that Burgess and Hood had no knowledge of their intent to take the men to the Ohio side.

REASON FOR GRANTING THE WRIT

The Decision of the United States Court of Appeals for the Sixth Circuit That the Defendant May Be Convicted of Federal Kidnapping Even Though the Government's Evidence Failed to Establish That the Victims Ever Crossed a State Line Is Clearly Erroneous and in Conflict With the Applicable Decisions of this Court.

The facts as submitted by all parties establish that on the night of July 3, 1979, there were two boats on the Ohio River and in them were the five defendants on trial. The undisputed facts are that Fields and Willis entered one or more of those boats at a point within the Commonwealth of Kentucky and that they disembarked at or near the northern shore of the Ohio River.

18 *USC* 1201(a) requires as an element of the offense that the United States prove that the victims were transported in Interstate Commerce. Under the facts of this case, the United States was required to prove that the victims were transported across the state line between Kentucky and Ohio at or near Ashland, Kentucky.

At the conclusion of the case for the United States, the defendants moved the Court to direct a judgment of acquittal on the grounds that the proof had failed to establish that such interstate transportation had occurred.

This court has recently resolved the long standing dispute as to the location of the boundary involved in the case in *Ohio* v. *Kentucky*, —— U. S. —— (1980), wherein the court held the boundary to be the low water mark of the Ohio River on the north side as it existed in 1792.

The only evidence offered by the United States as to the boundary was the testimony of Larry Anderson, Chief of the Mapping Department of the Huntington, West Virginia office of the Corps of Engineers. Mr. Anderson's training is as a photogramatest. App., p. 128.

Using a topographical map prepared by the Corps in the 1960's, Anderson stated that he was able to calculate with some specificity the low water mark of the Ohio River on July 3, 1979. App., p. 130. He stated that using maps and other data available in his office, he was able to determine the low water mark of the Ohio River on the north side as it existed in 1895. He stated that it was about 185 feet further south in 1895 than in 1979. App., pp. 133-134.

Anderson specifically stated that he had no records in his possession with which to form a professional opinion as to where the low water mark was in 1792. App., p. 136. Anderson did not claim to be in a position to give a professional opinion. On direct examination, Anderson states:

> Q. "Do you have an opinion, Mr. Anderson, as to where the low water mark of 1792 would have been based upon the information that you do

have at your access and based upon your education and training?"

Mr. Creech: "Where?"

A. "I would have to say that from the knowledge I have, I would have to say it would have to be in approximately the same area. I have no idea as to whether it would be one way or the other."

Anderson characterizes his thinking as to the 1792 low water mark as "speculation" and a "personal opinion". App., p. 141. Anderson nor any other witness testified that his opinion was based upon the best available data. The only thing established by the testimony of Anderson was that he himself did not have data of probative value regarding the 1792 low water mark.

While their evidence is undisputed that the victims did walk on the bank on the north shore of the Ohio River from the point that they got out of the boat until the point at which they crossed the bridge back into Ashland, Kentucky, a few minutes later, there is absolutely no evidence of record to establish that they crossed the low water mark of the Ohio River as it existed in 1792.

The Court of Appeals disposed of this failure of proof as follows:

"Though the exact position of the Ohio-Kentucky Border at Ashland, Kentucky has not yet been determined, it is undisputable that the two security guards walked on Ohio territory and were released at a location where their only feasible route to safety was the Ohio shore line. Also, one guard testified that both boats touched the Ohio shore."

The Petitioner's position does not rest upon whether the guards walked upon land lying north of the Ohio River but rather upon whether there is any evidence to support a finding that that land is within the state of Ohio. The testimony of the government's witness and the holding of the Supreme Court in *Ohio* v. *Kentucky, supra,* make it clear that the government failed in its proof.

This court in *Ohio* v. *Kentucky, supra,* has recognized the existence of various methods of fixing the low water mark of the Ohio River as it existed in 1792 with some degree of certainty. The government offered no proof from any of these sources, and their only witness did not claim the best available means of determination, he simply said he could not answer the question. Accordingly, the proof of the government in the present case failed as to an essential element of the offense charged, the interstate transportation of the victim.

The Ruling of the United States Court of Appeals for the Sixth Circuit That One May Be Convicted of Violation of 18 USC §1201 as an Aider or Abettor Even Though One Did Not Know or Contemplate That the Victim Would be Transported in Interstate Commerce Is In Direct Conflict With the Position of Other Circuits on the Same Issue.

There were two basic versions of the facts of this case. By the first theory the two guards were transported across the river, one in each boat. Fields was in the union's boat with Hood and Burgess, and Willis

in the bass boat with Crank, Dameron and Alcorn. Under this two boat theory each of the five defendants would have actually participated in each element of the offense. This two boat version is based upon one of the versions of the events given by the guard Fields.

The second version, also supported by Fields and by the four defendants who testified, is that Fields got out of the Union boad and back into the bass boat and that the two guards were taken to Ohio by Crank, Dameron and Alcorn after they had parted company with Hood and Burgess. Under this one boat theory Hood or this Petitioner could only have been convicted under the aider and abettor provisions of 18 USC §2, since they had not actually performed each element of the substantive offense.

The trial court chose to instruct the jury over his objection that it could convict petitioner as an aider and abettor based upon the one boat theory. There was absolutely no evidence to support an allegation that either Hood or Burgess knew when Fields left their boat for the bass boat that the persons in that boat would then transport the victims in interstate commerce. There is no evidence at all that there was a joint plan or design which contemplated any crime.

In *Mathews* v. *United States,* 449 F. 2d 985 (D.C. Cir. 1971) the court dealt with an almost identical situation in which Mathews and his partner robbed a business and in doing so kidnapped a man. They drove a few blocks and Mathews got out of the car telling his partner to "get rid" of the victim and meet him later. In "getting rid" of the victim Mathews'

partner crossed a state line out of the District of Columbia and into an adjoining state. In *Mathews,* the Court of Appeals held that Mathews could not be convicted of violation of 18 USC §1201 as an aider and abettor since at the time he surrendered control of the victim to his partner he neither knew or contemplated that he would then be transported in interstate commerce.

The Sixth Circuit Court of Appeals rejected the position of *Mathews, supra* and held that interstate transportation was a reasonably forseeable consequence of their acts. This is in effect the position taken by the dissenting opinion in *Mathews.*

This Court should resolve the conflict between the circuits on this issue and thereby reverse the Judgment of the Sixth Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons the court should issue a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

Nos.79-5387/5388

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

CHARLES WILLIAM HOOD and
WALTER DALE BURGESS, - - *Defendants-Appellants.*

ORDER — Filed April 25, 1980

BEFORE: WEICK and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Burgess and Hood appeal their convictions of federal kidnapping, 18 U.S.C. §1201. During the summer of 1979, the Oil, Chemical and Atomic Workers Union was on strike against the Semet Solvay Division of Allied Chemical Corporation, located in Ashland, Kentucky. In the early morning hours of July 4, 1979, Burgess and Hood, along with three fellow union members, seized at gunpoint two security guards at the plant. The guards were taken to two boats waiting on the Kentucky shoreline of the Ohio River. Over an hour later, the guards were released either on the Ohio shoreline or into the Ohio River near the Ohio shoreline.

Defendants raise several issues on appeal. First, they argue that the evidence is insufficient to establish an interstate transportation of the security guards. Though the exact position of the Ohio-Kentucky border at Ashland, Kentucky has not yet been determined, it is indisputable

that the two security guards walked on Ohio territory and were released at a location where their only feasible route to safety was the Ohio shoreline. Also, one guard testified that both boats touched the Ohio shore.

Second, defendants contend that the evidence did not justify the district court giving jury instructions on aiding and abetting the interstate kidnapping. A person acts as an aider and abettor if he knowingly associates with a criminal venture with intent to commit a crime, and then participates in the venture as something he wishes to have occur or acts in some way to make the venture succeed. *Mathews* v. *United States,* 449 F. 2d 985 (D. C. Cir. 1971). A person is liable for any criminal act which, in the ordinary course of events, was a natural or foreseeable consequence of a crime that he advised or commanded. *United States* v. *DeLa Motte,* 434 F. 2d 289 (2d Cir. 1970), *cert. denied,* 401 U. S. 921 (1971). We hold that the evidence justifies the instruction either on the theory that the defendants helped to cause the others to take the guards to Ohio or on the theory that the interstate transportation was a reasonably forseeable consequence of taking the guards onto the river.

Third, Hood contends that the comment of a witness for a codefendant upon Hood's failure to testify is prejudicial error. Hood's argument lacks merit, because the witness in fact did not comment on Hood's right against self-incrimination, but simply remarked that Hood did not want to hurt his union brothers by testifying. App. 228-29. Also, the comment was inadvertent and not intentionally elicited.

Finally, defendants argue that the district court erred in refusing to permit a police officer to testify about a prior inconsistent statement made by one of the guards about the description of the person who shot the other guard. The district court sustained the Government's objection on the basis of Rule 613(b), Fed. R. Evid., because defense

counsel had not asked the guard about his statement to the police officer. Because defendants did not lay the proper foundation required by Rule 613, we hold that the district court did not err in its ruling.

Accordingly, the judgment of the district court is affirmed.

Entered by Order of the Court
John P. Hehman, Clerk
(s) By Grace Keller
Deputy Clerk

No. 79-5388

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

WALTER DALE BURGESS, - - *Defendant-Appellant.*

ORDER — Filed June 2, 1980

BEFORE: WEICK and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

The petition for rehearing is denied.

Entered by Order of the Court
(s) John P. Hehman, Clerk